No. 76-1265

In the Supreme Court of the United States

OCTOBER TERM, 1976

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC., ET AL., PETITIONERS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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This litigation originated when petitioner National Association of Regional Medical Programs (NARMP) brought suit against the Secretary of Health, Education, and Welfare and others to compel the obligation of certain fiscal 1973-1974 funds appropriated under Title IX of the Public Health Service Act, as added, 79 Stat. 926, and amended, 42 U.S.C. 299 *et seq*. The complaint alleged that the respondents had unlawfully impounded the funds (Pet. App. 1A). The district court held that the impoundments were unlawful and on February 7, 1974, entered an order requiring that the respondents obligate the funds "to members of the plaintiff class *under terms and conditions* and for expenditure during such time periods *as were usual*

and normal prior to February 1973 when defendants began their unlawful impoundments" (Pet. App. 18A; emphasis added). By further order of July 22, 1974, all parties consented to the February 7, 1974, order and waived any right of appeal (Pet. App. 21A).

Thereafter, petitioners' counsel commenced ancillary proceedings for attorney's fees. In the course of such litigation, petitioners' counsel learned that the Department of Health, Education, and Welfare, in accordance with its normal procedures, had allocated a portion of the released funds for direct operational and overhead expenses. At the end of the fiscal year, $1,644,825 of these funds proved to be unneeded for such administrative expenses and, again in accordance with normal procedures, were permitted to "lapse" into the United States Treasury. Petitioners thereupon moved in the district court to compel the Secretary to obligate an additional $1,644,825 to them, maintaining that the court's final order of February 7, 1974 (as amended July 22, 1974) required that all appropriated funds actually be expended (Pet. App. 17A, 19A). The district court declined to do so, stating (Pet. App. 23A):

> The result plaintiffs seek is not required by or intended to be required by this court's final order. * * * The court believes that in all significant respects defendants have been faithful in carrying out Congress' will. As apparently is normal defendants divided the appropriation between grants and contracts and direct operations expenses. They reported to Congress the amounts of money devoted to each subdivision. This appears to be regular agency practice in carrying out a Congressional appropriation. Further, it apparently is normal when funds in one activity are not fully expended to allow those funds to lapse into the Treasury. This occurred in the instant case. Contrary to plaintiffs' allegations of bad faith on defendants' part, there is no evidence that defendants purposefully diverted an unusually large amount of funds to direct operations expenses or that they purposefully allowed funds to lapse in violation of this court's order.

The court of appeals affirmed *per curiam*, finding "no clear factual error or material error of law in the district court's findings" (Pet. App. 26A).

This case turns upon its unique and particular facts and raises no important matter of law that merits review by this Court. The only issue is whether the Secretary of Health, Education, and Welfare properly carried out the terms of the order issued by the district court at the conclusion of the litigation on the merits. That order required that the Secretary obligate and expend the funds in the "usual and normal" manner. The court that issued the order determined that the Secretary had complied with it. There is no reason for this Court to consider whether the district court has misconstrued its own order.[1] The

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[1]Petitioners suggest (Pet. 12-13) that Section 601 of the Medical Facilities Construction and Modernization Amendments of 1970, 84 Stat. 353, 42 U.S.C. 201 note, requires a different result. That statute provides only that appropriated funds "shall remain available for obligation and expenditure" until the end of the fiscal year for which appropriated. The district court correctly concluded that this statute did not prevent the Secretary's allocation of funds to administrative expenses and the routine lapse of unexpended funds so allocated into the treasury at the conclusion of the fiscal year (Pet. App. 23A). Petitioners' reliance on Section 111, Act of July 1, 1973, 87 Stat. 134, 31 U.S.C. (Supp. V) 665b, and Section 501 of the Supplemental Appropriations Act, 1974, 87 Stat. 1077, also is misplaced. The text of those statutes, and also the legislative history cited by petitioners (Pet. 14-15), show that their purpose and effect was simply to insure that the

court of appeals, in reviewing this case, correctly observed (Pet. App. 26A):

> This district court order clearly says that the illegally impounded funds were to be obligated and expended as was "usual and normal prior to February 1973, when defendants began their unlawful impoundments." Final Order of February 7, 1974, para. 3. In the order appealed from, the district court found that it is "normal" for HEW to divide the funds between direct operations and grants. HEW followed its normal practice in dividing the impounded funds therefore, and there is no evidence to suggest that an unusually large amount of the funds were diverted into the direct operations category. As we saw in *National Council of Community Mental Health Centers* v. *Mathews,* Nos. 75-1335,-1353 (D.C. Cir. Nov. 9, 1976), it is also normal for the unexpended balances of these funds, whether they are labeled direct operations or grants, to lapse into the United States treasury at the end of each fiscal year.
>
> This being so, we can find no clear factual error or material error of law in the district court's findings.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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expiration of the fiscal year would not place disputed funds beyond the reach of courts adjudicating impoundment claims. Those statutes do not bear on the question whether unexpended funds that had been properly allocated for administrative expenses lapse upon expiration of a fiscal year after final adjudication of an impoundment claim on its merits.